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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

NO._____

J. P. COLEMAN, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI_____Petitioner

vs.

TRUNKLINE GAS COMPANY_____Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

I.

PRELIMINARY STATEMENT

The Attorney General of the State of Mississippi, the petitioner herein, prays that a writ of certiorari issue to review the final judgment of the Supreme Court of Mississippi entered on March 2, 1953, which reversed a prior judgment of the same court dated November 24, 1952, and affirmed a judgment of the Circuit Court of the First Judicial District of Hinds County, Mississippi, dated September 18, 1952, and reversed the decision of the State Tax Commissioner of the State of Mississippi, dated September 2, 1952. Among the questions involved in this cause is that of whether Chapter 410 of the Laws of Mississippi for 1952 is a valid tax exaction from Trunkline by the State of Mississippi, or whether said Chapter 410 violates the commerce clause of the Constitution of the United States as a tax on the privilege of engaging in interstate commerce.

II

OPINIONS BELOW

The assessment of the tax against respondent made by the Tax Commissioner of the State of Mississippi was made on August 1, 1952 (R. 4-10 Incl.) and the final order entered on September 2, 1952 (R. 18 & 19). The final judgment of the Circuit Court of Hinds County was entered on September 18, 1952 (R.22).

On November 24, 1952, upon proper appeal proceedings the Supreme Court of Mississippi, by a five to four decision, sustained the levy and collection of the tax as valid, and not violative of the commerce clause of the Constitution of the United States (R. 25-45). The minority opinion expressing the view of the four dissenting Justices that the act was violative of the commerce clause appears (R. 46-51). A final judgment was rendered (R. 51) sustaining the validity of the tax, but which opinion, including the dissent, is not yet officially reported, but is unofficially reported in 61 So. (2d) 276.

Suggestion of Error was properly filed in the Supreme Court of Mississippi. Justice J. P. Alexander, one of the majority rendering the aforesaid judgment, died on January 1, 1953. Justice Lotterhos was appointed in his place and participating in the final judgment of the court aligned himself with the former minority, thus constituting a majority of five to four, *which rendered the final judgment of the Supreme Court of Mississippi on March* 2, 1953 (*R.* 71-78) whereby the tax statute was held violation of the said commerce clause and *of which this review is sought.* The opinion, including the dissent, of four Justices is not yet officially reported, but is unofficially reported in 63 So. (2d) 73.

Justices Etheridge, Lee, Arrington and Kyle, four of the original majority of the court retaining their original opinion dissented (R. 78-101).

III

JURISDICTION

The final judgment of the Supreme Court of Mississippi was rendered on March 2, 1953. No further pro-

ceedings could be had in this cause before the Supreme Court of Mississippi. The time for filing this petition for writ of certiorari was extended to and including July 15, 1953 (R. 103). The jurisdiction of this court is invoked under *Section* 1257 (3) *Title* 28 *U.S.C.*, whereby this court is given jurisdiction to review the decision of the Mississippi Supreme Court which held that a Mississippi Tax statute was invalid as violative of the Federal *Constitution Article I, Section VIII, subsection* (3) being the Commerce Clause thereof, as a tax on the privilege of engaging in interstate commerce.

The Federal Question in this cause was properly, timely and fully raised by Trunkline and squarely passed upon by the Mississippi Supreme Court. (R. 15, 16, 3, 24, 25-51 71-78).

IV

QUESTIONS PRESENTED

1. Does Chapter 410 of the Laws of Mississippi for 1952 lay a valid tax upon Trunkline when challenged by respondent's contention that it violates the Commerce Clause of the Federal Constitution as levying only a tax upon the privilege of engaging in interstate commerce?

2. It is apparent that the Mississippi Supreme Court erroneously and contrary to its own decisions and those of this court held that the State Tax Commissioner had adjudicated or found that Trunkline by paying income, ad valorem and franchise taxes to Mississippi had fully paid for all benefits and protection of and from the laws of Mississippi and could not be required to pay additional taxes for benefits and protection, and furthermore irrespective of the provisions of said Chapter 410 that the tax levied thereby was "in addition to all other taxes"?

3. It is apparent that the final decision of the Mississippi Supreme Court erroneously departed from the clear, unambiguous terms of said Chapter 410 and sought to legislate rather than give effect to the legislative act

as written and disregarded the provisions of Chapter 410?

4. This court may for itself determine the "operating incidence" of the tax involved in this cause and so determine whether the tax is violative of the Commerce Clause of the Federal Constitution.

5. *The tax involved is not discriminatory, is duly apportioned, cannot be repeated by any other state and is not unduly burdensome in fact* upon Trunkline's alleged interstate operation, so even assuming for the sake of argument, that said tax levied by Chapter 410 of the Laws of Mississippi for the year 1952 is a tax upon the privilege of doing or engaging in interstate commerce the tax does not violate the Commerce Clause of the Federal Constitution.

6. Does the record evidence that Trunkline performed or engaged in *local activities* in Mississippi with the consequent effect thereof.

7. The court should or does take judicial notice of the facts indicated in the *STATEMENT OF FACT* as those which this court judicially knows.

8. If part of said Chapter 410 is unconstitutional and part constitutional when measured by the above challenge of Trunkline and in view of the separability provision of said Chapter 410 may the valid portion thereof be sustained as validly levying the tax against Trunkline as contended for by petitioner?

9. Can justice between the parties and to the questions involved be done by the court, upon the material facts in this record, if there be doubt in the mind of the court as to the constitutionality of the statute engendered by an apparent lack of full development of the material facts which could be developed upon further proceedings below? If such justice could not be done should this cause be reversed and remanded for further proof below in accordance with the directions of this Court?

V

STATUTES INVOLVED

The statutes immediately involved in this cause are:

A. *Article I, Section VIII, subsection* 3 *of Constitution of the United States of America*: "(3) *To regulate commerce* with foreign nations, and *among the several states,* and with the Indian tribes;"

B. *Chapter* 410, *Laws of Mississippi for* 1952 under which the tax involved is sought to be collected and out of which this suit grows.

The full meaning and effect of said Chapter 410 is more apparent when viewed in the light of its antecedent statutes and the construction of one of them by this court. For this reason, we treat this subject as presented in this section of The Petition presenting the state statutes dealing with the subject at hand in the order of their enactment by the Legislature of Mississippi.

Apparently said Chapter 410 was enacted to comply with the announcement of this court in *State Tax Commission vs. Interstate Natural Gas Company,* 284 *U. S.* 41, 76 *L. Ed.* 156, 52 *S. Ct.* 62, decided November 23, 1931, and other related decisions rendered between 1931 and April 1952.

As is universally and necessarily the case, we dare say, Federal and *State Tax Legislation* comes after or follows judicial interpretation of prior or existing tax statutes, or those of another jurisdiction on related subjects, persuaded by the federal or local state need, as determined respectively by Congress and State Legislatures, for funds to provide local benefits and protection to persons, natural and artifical, and property and local activities within its borders.

The tax involved in this cause is sought to be collected solely under the 1952 Act and not under the 1930 or 1944 Act. The 1930 Act was amended by the 1944 Act and it is amended by the 1952 Act. The 1930 and 1944 Acts are

set out solely for the purpose of showing the Legislative history of the 1952 Act, which further demonstrates its validity, and which Acts of 1930 and 1944 are:

1. *Chapter* 88, *Section* 163, *Laws of* 1930:

"SEC. 163. PIPE LINE COMPANY. — Upon each person engaging and/or continuing in this state in the business of operating a pipe line or transporting in or through this state, oil, or natural, or artificial gas, through pipes, and/or conduits, a tax as follows:

"On each mile of pipe having a diameter of 20 inches or more $50.00
"On each mile of pipe having a diameter of 15 inches and less than 20 inches $35.00
"On each mile of pipe having a diameter of 12 inches and less than 15 inches $25.00
"On each mile of pipe having a diameter of less than 12 inches $10.00

"The term 'pipe line' as used in this section shall include only trunk lines and shall not apply to those pipe lines used solely for distributing gas or oil in or near cities, towns and villages (known as service lines), to the ultimate consumer. And this section shall not apply to those persons, firms, or corporations mining and/or producing gas or oil on which a privilege tax measured by gross production is imposed and paid in this state."

Consistently with the thinking of the court in 1931 and upon the apparently limited record then before the court in the case of *State Tax Commission vs. Interstate Natural Gas Company, Inc.*, 284 *U. S.* 41, 76 *L. Ed.* 156, 52 *S. Ct.* 62 the court held the above quoted Section 163, Chapter 88 of the Laws of 1930 invalid solely as violative of the above commerce clause as a tax on the privilege of engaging in interstate commerce.

2. *Chapter* 138, *Section* 34, *Laws of Mississippi*, 1944

"PIPE LINE COMPANIES. Sec. 34. Upon each person engaging or continuing in this state in the business of operating a pipe line, or transporting gas in

or through this state oil, or natural or artificial gas through pipe or conduits, a tax as follows:

"On each mile of pipe having a diameter of 20 inches or more $75.00

"On each mile of pipe having a diameter of 15 inches and less than 20 inches $52.50

"On each mile of pipe having a diameter of 12 inches and less than 15 inches $37.50

"On each mile of pipe having a diameter of 12 inches $15.00

"The term 'pipe line' as used in this section shall include only trunk lines, and shall not apply to those pipe lines used solely for distributing gas or oil in or near cities, towns and villages, (known as service lines), to the ultimate consumer. And this section shall not apply to those persons, firms or corporations mining or producing gas or oil on which a privilege tax measured by gross production is imposed and paid in this state."

No tax was ever sought to be collected under the above 1944 Act from one performing the same or similar acts performed by Trunkline, nor was it ever construed by any court.

3. *The Mississippi Taxing Act immediately involved*: *Chapter* 410 *Laws of* 1952

"An Act to amend section 34, chapter 138, Laws of 1944, so as to increase the privilege tax on pipe line companies and to levy a graduated tax based upon the size of pipe lines carrying crude oil, liquid petroleum products and natural or artificial gas.

"Be it enacted by the Legislature of the State of Mississippi:

"Section 1. That section 34, chapter 138, Laws of 1944, be and the same is hereby amended to read as follows:

"Section 34. Upon each person operating a pipe line in or through this state or engaged in transporting

in or through this state crude oil, liquid petroleum products, and natural or artificial gas through pipes or conduits, for the privilege of exercising or enjoying such right and power in this state, and for the privilege of enjoying and receiving the benefit and protection of the government and laws of this state, there is levied a tax, *in addition to all other taxes as follows*: (emphasis ours)

"On each mile of pipe having a diameter of less than twelve (12) inches ..... $ 15.00

"On each mile of pipe having a diameter of twelve (12) inches and less than fifteen (15) inches ..... $ 37.50

"On each mile of pipe having a diameter of fifteen (15) inches and less than twenty (20) inches ..... $ 52.50

"On each mile of pipe having a diameter of twenty (20) to twenty-six (26) inches, inclusive $75.00

"On each mile of pipe having a diameter of over twenty-six (26) inches $125.00

"The term 'pipe line' as used in this section shall apply to both interstate and intrastate trunk lines, but shall not apply to those pipe lines, known as service lines, used solely for distributing gas or other petroleum products in or near cities, towns, and villages to the ultimate consumer. And this section shall not apply to those persons, firms or corporations mining or producing gas or oil on which a privilege tax measured by gross production is imposed and paid in this state.

"Section 2. If any part, section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. It is hereby declared that this act would have been passed irrespective of the fact that any one or more parts, sections, subsections, sentences, clauses phrases are declared unconstitutional or invalid.

"Section 3. This act shall take effect and be in force from and after its passage.

"Approved April 12, 1952."

VI

STATEMENT OF FACT

The material facts in this case are undisputed, and supplementing the statements contained in the section "Opinions Below", supra, such material facts are:

(R. 1-10, incl; 13, 14, 18, 19.)

Just prior to October 1, 1951, respondent Trunkline, a Delaware natural gas corporation, completed the construction of 147.21 miles of 24 to 26 inch natural gas pipe line in or on the soil of the State of Mississippi. This line was part of Trunkline's natural gas pipe line commencing at McAllen, Texas, proceeding thence through the states of Louisiana, Arkansas, Mississippi, Tennessee, Kentucky and ending near Tuscola, Illinois. On said October 1, 1951, Trunkline began transportation of natural gas through said pipe line and all of which gas was put into the pipe line outside the State of Mississippi, and all of which gas in said pipe line was carried through and beyond the State of Mississippi. None of the products of Trunkline was bought, sold, produced or distributed in Mississippi. Respondent is neither domesticated nor qualified to do business in the State of Mississippi. For the year 1952 Respondent was liable for and properly paid to the State of Mississippi and governmental subdivisions thereof the following taxes:

Income tax $21,477.00; Franchise tax $4,711.50 and Ad valorem tax $144,150.00.

As a part of and inherently flowing from the foregoing, the following undisputed facts are in this record for consideration by the court by way of judicial notice thereof by the court and which are of equal force and dignity with the foregoing, and which are:

Trunkline, to construct its pipe line in and through the soil of Mississippi did acquire land or rights in land by

purchase or by eminent domain subject to Mississippi laws promulgated, sustained, enforced and financed by its tax revenue with the resulting local rights and privileges flowing to Trunkline from local laws and government of Mississippi. Trunkline made and makes use of such land or interests in land and the roads and transportation facilities of Mississippi, built and maintained by the State of Mississippi, at state expense, over which to move its pipe and necessary equipment to the land in or through which the pipe is laid. Trunkline used the aforesaid *facilities of the State of Mississippi* in the course of doing and supervising the maintenance and repairs which are necessarily done upon said pipe line, *all of which is done in the State of Mississippi.* Trunkline received in Mississippi, locally, the benefits and protection, just as every Mississippi citizen and other owner of property within the confines of the state receives, from the law enforcement officers and courts of this state in owning, operating, maintaining, protecting and preserving this 147.21 miles of pipe line against every other person in the world, including those who might undertake to interfere therewith, impede, or damage or claim the same.

Trunkline owned and operated pipe line compressor station in Mississippi where by combustion engines using natural gas from the pipe line, the gas pressure in said pipe line was "boosted" in order to push and move the natural gas along the lines. Numerous employees living in Mississippi were employed prior and subsequent to April, 1952, who carried on in Mississippi in various ways the business and activities of Trunkline, and who with Trunkline are governed and controlled in their respective mutual duties and obligations by the laws of Mississippi. In addition to the real and personal property composed of buildings and machinery owned and operated as and at such "compressor stations" in Mississippi, including residences rented to and housing employees, Trunkline owned and operated in Mississippi various trucks and automobile used in and about the operation of this business in Mississippi. The assessment rolls and public records of the State, clearly reflect such ownership.

VII

BRIEF IN SUPPORT OF THIS PETITION

By way of separate document petitioner submits a brief in support of this petition.

VIII

REASONS FOR ISSUANCE OF THE WRIT

1. The National public welfare and that of the respective states, including their exercise of sovereignty in finding necessary revenues to meet the ever increasing demands of *industry* and *commerce, suggest* that the court use this cause whereby to further clarify the controlling principles and precedents applicable to this case.

2. Confusion and consternation has resulted among the bench, bar, the respective state legislatures and taxing officials from the Mississippi Supreme Court's reversal of itself in this cause and which should be and can be clarified and settled only by this court. The first decision of November 24, 1952 (R. 25-45) sustained the tax by a five to four decision. Suggestion of Error was filed (R. 53-71). Justice Alexander of the majority died January 1, 1953, and Justice Lotterhos was appointed in his place. Each of the other eight Mississippi Justices retained their original opinion, leaving four on each side, and Justice Lotterhos in the final opinion of March 2, 1953, aligned himself with the original dissenters, thus constituting a majority, which by five to four held the tax invalid on the sole ground that it constitutes a tax on the privilege of engaging in interstate commerce. The two holdings of the court are directly and irreconcilably in conflict on the same point.

3. The decision of the Supreme Court of Mississippi is in conflict with the applicable and controlling decisions of this Court, including the following:

a. *Coverdale v. Arkansas-Louisiana Pipe Line Co.* (1938) 303 *U. S.* 604, 82 *L. Ed.* 1043;

b. *Memphis Natural Gas Co. v. Stone* (1948) 335 *U. S.* 80, 68 *S. Ct.* 1475, 92 *L. Ed.* 1832;

c. *Central Greyhound Lines v. Mealey* (1948) 334 *U. S.* 653, 68 *S. Ct.* 1260, 92 *L. Ed.* 1633;

d. *Western Live Stock v. Bureau of Revenue* (1938) 303 *U. S.* 250, 58 *S. Ct.* 546, 82 *L. Ed.* 823;

e. *Stone v. Interstate Natural Gas Co.*, 103 *Fed.* (2d) 544 (*CCA 5th* 1939), *affirmed per curiam*, 308 *U. S.* 522, 60 *S. Ct.* 292, 84 *L. Ed.* 442;

f. *McGoldrick v. Berwind-White Coal Mining Co.* (1940) 309 *U. S.* 33, 84 *L. Ed.* 565;

g. *Interstate Oil Pipe Line Co. v. Stone* (1949) 337 *U. S.* 662, 69 *S. Ct.* 1264, 93 *L. Ed.* 1613.

h. *State Tax Commission of Mississippi v. Interstate Natural Gas Co.* (1931), 284 *U. S.* 41, 76 *L. Ed* 156.

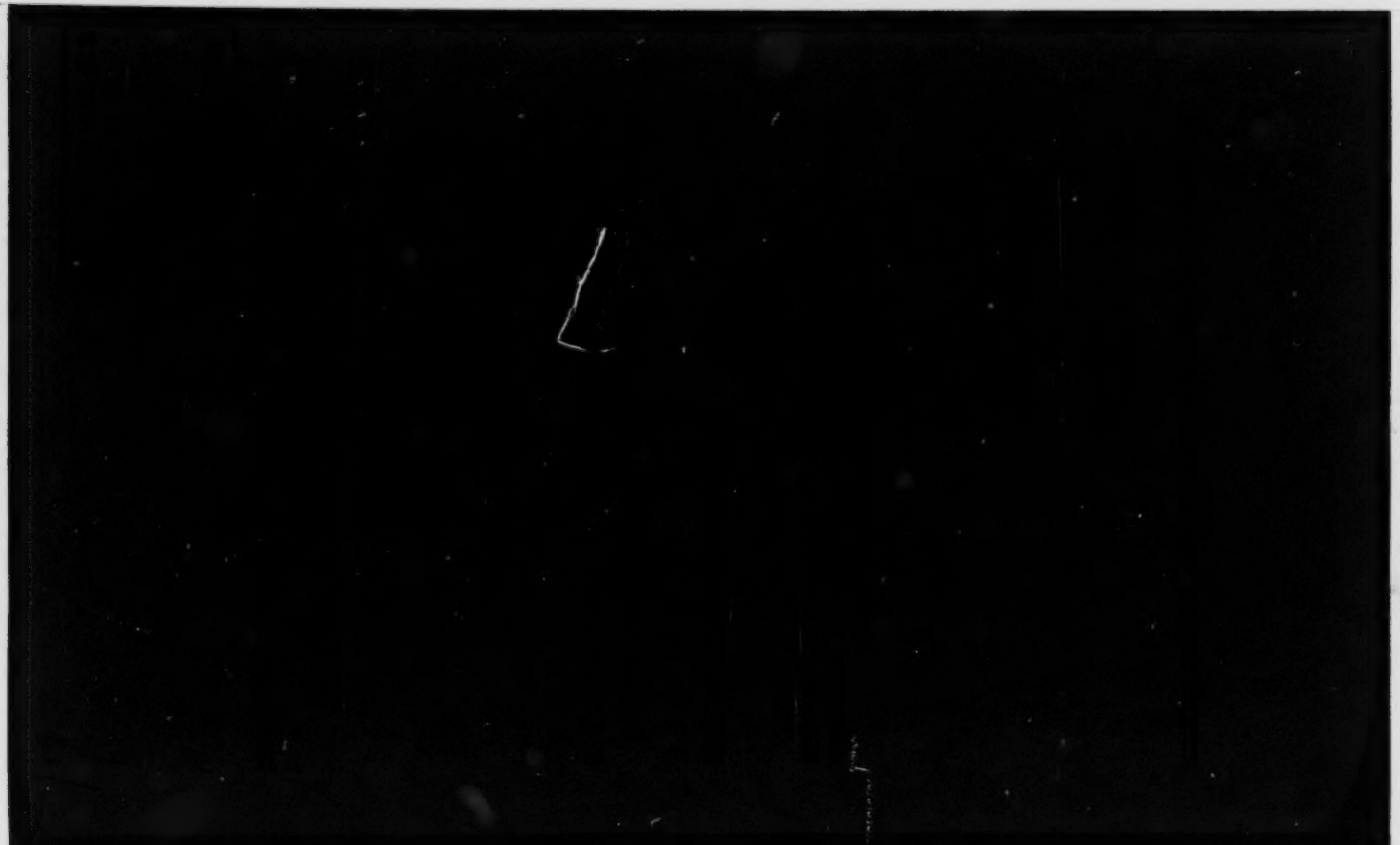
4. The decision of the Supreme Court of Mississippi is in irreconcilable conflict with its own decisions.

CONCLUSION

WHEREFORE, a writ of certiorari is respectfully requested to be issued to the Supreme Court of the State of Mississippi.

J. P. Coleman,
Attorney General of the
State of Mississippi.
J. H. Sumrall
Dugas Shands
Counsel for Petitioner

Jackson, Mississippi



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

NO._____

J. P. COLEMAN, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI_____Petitioner

Vs.

TRUNKLINE GAS COMPANY

BRIEF OF J. P. COLEMAN, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI.

May it please the Court:

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

STATEMENT OF THE CASE

A statement of the case, including the opinions, pleadings and facts, has heretofore been made in the petition for a writ of certiorari, pages 1, 2, 9 & 10 thereof, which is filed as a separate document and to which reference will be made throughout this brief so as, whenever possible, to avoid restatement of that which has been set out in the petition. The legend (Pet._____), with a page umber indicated within brackets, will refer to the page of the petition containing the facts or matter referred to.

II

SPECIFICATION OF ERRORS

1. The lower court erred in not holding that the "operating incidence" of Chapter 410 of the laws of Mississippi for the year 1952 is the privilege of exercising local rights and powers, local activities, in Mississippi and receiving locally, in Mississippi, the benefit and protection of the government and laws of Mississippi in, to and of such local activities, and should have found that the statute did not violate the Commerce Clause for the reasons herein set out.

2. The lower court erred in not taking judicial notice of the local activities of Trunkline in Mississippi and giving proper effect thereto. This court may and should do so.

3. Chapter 410 of the laws of Mississippi for 1952 plainly, clearly and unambiguously states the "operating incidence" thereof as being a tax upon the privilege of exercising local rights and powers, local activities, in Mississippi and receiving locally, in Mississippi, the benefit and protection of the government and laws of Mississippi in, to and of such local activities, and being unambiguous should be accepted by the court as written without construction thereof, and the holding of the lower court to the contrary is erroneous and ill-founded.

4. The lower court erred in holding the tax involved not valid as violative of the commerce clause even though it be actually a tax upon the privilege of engaging in interstate commerce.

III

PETITIONER'S AFFIRMATIVE SPECIFICATIONS

1. The determination of the lower court of the "operating incidence" of the tax levied by Chapter 410 is not

binding on the Supreme Court of the United States because such determination is ill-founded or not a reasonable interpretation of Chapter 410; the Supreme Court of the United States may determine for itself the "operating incidence" of the tax.

2. If justice demands, or if in order to do justice to the questions involved and the rights of the parties, this court may and should reverse and remand this cause for further proof with such directions as this court may prescribe.

IV

PRELIMINARY STATEMENT

We believe a preliminary statement by petitioner upon certain features of this case at this point in the brief will be of assistance to the court and thus the followin statements:

1. This litigation further evidences the outgrowth of a very serious situation confronting every state in the union in or through which interstate commerce is carried on. Within the past fifteen or twenty years the growth of interstate commerce and transactions in interstate commerce has immeasurably directly increased the cost of and burden upon the respective state governments. This court has in numerous decisions recognized the existence of this situation, and has held that the states are entitled to require interstate commerce to pay its fair share of the cost of maintaining and operating such state governments, and *so to do is not, as such, violative of either the letter, the purpose or the intent of the Commerce Clause.*

In granting this right to the states, however, the court has safeguarded the rights of those engaged in interstate

commerce by requiring the exercise of such right by the state to be done through "constitutional channels."

The case at bar, we say with all deference, is merely Mississippi's effort to require Trunkline and the other pipe line companies whose liability for the tax is involved in this case and will be measured hereby, to pay their fair share of the cost of the government and laws of the State of Mississippi from and by which they benefit through and in their local activities carried on in Mississippi as reflected by the record. This, under the Memphis Natural Gas case, 335 U.S. 80, infra, and other deceisions of this court, has been held to be a legitimate way or a proper "constitutional channel" through which to require them to pay such fair share of such cost.

2. The "constitutional channel" selected by Mississippi is Chapter 410 of the Laws of Mississippi for the year 1952 and whether the course taken by Mississippi is, or is not, that approved by this court *is soluable only by the decisions of this court,* and the things, acts and activities, judicially referred to as "local activities" which trunkline and the other pipe line companies were doing in Mississippi when its legislature determined, as it unquestionably has the right to do, that pipe line companies, intra and interstate, must be required to pay the above fair share of the cost of government. In this connection we must view this cause from the standpoint of, upon what did the legislature of the State of Mississippi base Chapter 410—and we must further consider, in this cause, whether the legislature speaking through said Chapter 410 spoke in plain, clear and unambiguous terms so as to thereby determine whether the Mississippi Supreme Court was obligated to accept the terms of Chapter 410 as written and stated by the legislature or whether the statute was couched in abstruse or ambiguous terms,

which would permit the court to enter into a "judicial construction and interpretation" of the statute. We say that the statute is clear and unambiguous and that any attempt, as the lower court did, "to judicially construe the statute" is ill-founded and a mis-exercise of the judicial function of the Supreme Court of Mississippi and, therefore, not binding upon this court. Wherever, in this brief, we use the expression "ill-founded" as applied to the second, final, opinion of the lower court we use it with all deference and mean no offense thereby to the lower court or any member thereof — — we adopted sair expression from the decision of this court in *Cudahy Packing Co. v. Minnesota,* 246 *U. S.* 450, 62 *L. Ed.* 827, at page 454 thereof.

3. The solution of this cause should be approached with the attitude that every statute is presumed to be constitutional until proven to be unconstitutional beyond every reasonable doubt.

4. As we believe is apparent from the proceedings and contentions made below, which are reflected in the record, a feeling existed that merely because Chapter 410 has been tagged or designated as a "privilege tax" either does, or has a tendancy to, prejudice the tax or plant the "kiss of death" upon it. The designation of a tax as a privilege tax does not prjudice or kill the tax as this court squarely held in the case of *Coverdale v. Arkansas-Louisiana Pipe Line co.,* 303 *U. S.* 604, 82 *L. Ed.* 1043, and other related cases, that a Louisiana privilege tax, measured by engine horse power, upon the use of gas combustion engines at gas pipe line compressor stations in Louisiana, which boosted the pressure in the main trunk line, was valid and though the pipe lines could not be used or the gas delivered without such engines, such tax was

neither a direct tax on interstate commerce nor upon the privilege of engaging in interstate commerce.

When Chapter 410 of the laws of Mississippi was drafted and enacted by the legislature on April 12, 1952, the legislature knew or is presumed to have known of and have been familiar with the following:

(a) What the pipe line companies were doing in Mississippi; (b) the taxes, ad valorem, income and franchise, they were paying, and why they were paying those taxes; (c) the method by which they were doing and performing acts in Mississippi—local activities—; (d) the statutes constituting the antecedents of Chapter 410, consisting of *Chapter* 88, *Section* 163 *of the Laws of* 1930 (Pet. 6) and the 1931 decision of this court construing this statute, *State Tax Commission of Mississippi v. Interstate Natural Gas Co.*, 284 *U. S.* 41, 76 *L. Ed.* 156; (e) *Section* 34, *Chapter* 138 *of the Laws of* 1944 (Pet. 6 and 7); (f) the provisions of *Sections* 9312, 9313 *and* 9314 *of the Mississippi Code of* 1942 and the case of Stone v. Memphis Natural Gas Company, which we have quoted in the appendix of this brief, pages i, ii, thereof, whereby a franchise tax was levied upon Memphis Natural Gas Company, a non-resident Delaware comporation, not qualified to do business, and engaged solely in interstate commerce in Mississippi and which tax was sustained by the Mississippi Supreme Court solely on the ground of certain local activities performed by Memphis Natural Gas in Mississippi which are identical with the local activities performed by Trunkline in Mississippi in the case at bar; (g) the decision of this court in *Memphis Natural Gas Co. v. Stone, decided in June,* 1948, 335 *U. S.* 80, 92 *L. Ed.* 1832, sustained the above Mississippi decision and franchise tax, and (h) *Interstate Oil Pipeline Co. v. Stone, decided in* 1949, 337 *U. S.* 662, 93 *L. Ed.* 1613,

wherein the court about a year later confirmed and approved its announcements in the Memphis Natural Case, and the case of *Central Greyhound Lines, Inc., of New York v. Mealey,* 1948, 334 *U. S.* 653, 92 *L. Ed.* 1633, and that of *Stone v. Interstate Natural Gas Co.,* 103 *Fed.* (2*d*) 544, affirmed by this court in 1930 and 308 U. S. 522, 84 L. Ed. 442, and that of *Western Live Stock v. Bureau of Revenue,* 303 *U. S.* 240, 82 *L. Ed.* 823 and *Coverdale v. Arkansas-Louisiana Pipe Line Co.* 1938, 303 *U. S.* 604, 82 *L. Ed.* 1043 and the other decisions of this court culminating and mentioned therein.

May we say at this point, that the case at bar is controlled by and all of the contentions urged by Mississippi, through its Attorney General, are thoroughly supported and sustained by the *Memphis Natural Gas case decided in* 1948, 335 *U. S.* 80, *supra and infra,* and that the statutes there approved, as being constitutional, are substantially identical in wording and are identical in legal effect, with those involved here and that all of the contentions made in the Memphis Natural Gas case are the same or substantially the same, being made in the case at bar, as will be more fully discussed in subsequent portions of this brief.

Chapter 410 of the Laws of 1952 (Pet. 7-9, inclusive) was drawn upon and in an effort to comply with the above mentioned cases and particularly the Memphis Natural Gas case, 335 U. S. 80. The decision of the lower court is ill-founded and contrary to, not only the above decisions of this court but also, the prior Mississippi decisions of *Stone v. Memphis Natural Gas Co.,* 201 *Miss.* 670, 29 *So.* (2*d*) 258, *supra,* and those therein relied upon being *Stone v. General Contract Corporation,* 193 *Miss.* 301, 7 *So.* (2*d*) 806, *Stone v. General Electric Contracts Corpor-*

ation, 193 *Miss.* 317, 7 *So.* (2*d*) 811, together with other Mississippi decisions which we will discuss, infra.

6. *Only this court can clarify the confused and uncertain situation resulting from the two irreconcilably conflicting decisions of the Mississippi Supreme Court rendered in the case at bar,*—one on November 24, 1952, by a five to four majority (R. 25-45), sustaining the validity of the tax, and another on March 2 1953 invalidating the tax, the personnel of the court having been changed in the meantime.

7. The delicate balance of the questions involved upon the scales of the Mississippi Supreme Court and the uncertainty and the lack of finality resulting from the circumstances of its decision does, we believe, *beg* a full consideration of this cause upon a writ of certiorari by this court.

8. This is not just a question of concern to Mississippi alone. Every state in the union, their legislatures, attorneys general and tax collecting authorities, together with industry and commerce, will be left in an uncertain position unless this court uses this cause as a vehicle whereby to further clarify the controlling principle applicable hereto. As to what, even the Supreme Court of Mississippi might say about this cause is left sorely uncertain in the event of a change in personnel of the court. With all sincerity we believe that the question of the meaning of the commerce clause is in and of itself complex enough without leaving the matter with added uncertainty produced by the second, final, Mississippi decision. As the matter now stands those charged with enacting and enforcing the revenue laws of Mississippi could not, we beileve, proceed with even a remote degree of certainty, and, indeed, such a situation is not heal-

ful from the standpoint of the taxpayer and collecting authorities.

The importance of a clear solution of this case to commerce and the respective states is in direct proportion as the revenue of each state in the Nation bears to interstate commerce carried on therein.

9. The sum of $233,233.88 tax to the State of Mississippi for the fiscal year 1952-1953 depends upon this case (R. 7 & 8), and if additional pipe lines are constructed therein such dollar and cent difference to the State of Mississippi will increase in direct proportion. Furthermore the legislature of the State of Mississippi on the present state of the case would be sorely in doubt as to what they could or should do in the future.

10. We believe that this record thoroughly sustains our statement on the decision to the effect that all federal and state tax legislation does or should follow the interpretation of this court, *and that so to do, as Mississippi sought to do in Chapter* 410 *is no reflection, as such, on the statute or the idea thereof.* We mention this, because of the following portion of the final, second, opinion of the Mississippi Supreme Court of March 2, wherein at page 74 of the record Justice Hall, speaking for the final majority, says:

> "In an apparent effort to circumvent the effect of the numerous decisions of the United States Supreme Court which have condemned such cases, the 1952 Legislature enacted the aforesaid Chapter 410 * * * "

11. We submit that it is immaterial whether the tax levied be termed or denominated a privilege tax or a franchise tax, as it is not the name we give the tax, but whether the substance of the tax infringes upon the commerce clause.

12. The true "operating incidence" of the tax levied by Chapter 410 of the Laws of Mississippi for the year 1952, as so tersely and ably stated by Justice Ethridge in the first decision of the Mississippi Court (R. 25-45) and in the dissent (R. 78-101) *is the privilege of exercising local rights and powers, local activities, in Mississippi, and receiving locally, in Mississippi, the benefit and protection of the government and laws of Mississippi in, to and of such local activities.*

This is the same "operating incidence" of the tax approved and sustained in the *Memphis Natural Gas Company* case, 335 *U. S.* 80, supra, decided in 1948 by this court.

13. If justice can be done upon this record in its present condition before this court, then we understand the ultimate position of Trunkline is that they must, to prevail here, sustain the final decision announced by the lower court and accept the tax as defined and stated by the lower court and for the reasons chosen by the lower court to sustain their conclusion.

14. On this basis let us briefly look at the tax with which this court is confronted in the spotlight of constitutionality, giving unto it the qualities and points of validity conceded to it, or not denied to it, by the lower court:

(a) Does the tax amount to an unreasonably and arbitrary classification? No.—The lower court did not so hold in either opinion and rejected such contention of Trunkline.

(b) Is the tax discriminatory or not duly apportioned? No. The lower court did not so hold. The tax is measured by pipe mileage in Mississippi of stated diameters.

(c) Can the tax be repeated by any other state? No.

(d) Is the tax levied by Chapter 410, in and of itself, unduly burdensome, in fact, i.e., from a dollar and cent standpoint—No. Does it in legal theory, but not in economic fact, impose a substantial or undue burden on interstate commerce, amounting to, at least, a potential burden on interstate commerce? No. Does it do this, even when added to all other taxes paid in Mississippi by Trunkline and the other gas companies? No. Neither Trunkline nor the other pipe line companies contended in the lower court for any invalidity on this score, and furthermore the lower court did not so hold or mention this feature in the opinion.

Upon what, then, did the lower court base its decision, and what did it hold? It held that the "operating incidence" of the tax was solely the privilege of engaging in interstate commerce and it reached such a holding, as we believe is apparent from the decision, solely by way of conclusion upon a theory eliminating local activities done by Trunkline in Mississippi as the "operating incidence" on the ground that such local activities could not validly be the "operating incidence," because Mississippi could not tax such local activities, because such woud be double taxation as Mississippi had collected ad valorem, income and franchise taxes from Trunkline and the other pipe line companies, and had thereby exhausted Mississippi's capacity to levy a tax based upon such local activities.

15. The above mentioned theory of double taxation or the theory for eliminating the right to tax local activities under Chapter 410, which is the sine qua non of the final decision of the lower court, is sharply in conflict with announcements of Justice Reed in the Memphis

Natural Gas case, 335 U. S., page 85, where in the face of the contention of Memphis Natural that as it was paying ad valorem tax and had bought Mississippi benefits and protection thereby, it could not be taxed further therefor by a franchise tax, he said:

> " * * * No reason is perceived why Mississippi cannot exact this different tax for the same protection. * * *"

And of which contention in the case of Justice Rutledge says at pages 98-99:

> " * * * Nor is the state limited to a single exaction for different or indeed like protections afforded, so long as each is safeguarded against prohibited effects upon commerce, as are those laid by Mississippi, and their aggregate cannot be shown to contravene the clause's purpose."

These announcements of this court have never been overruled, or modified.

16. The lower court, and this court, takes judicial notice of and judicially knows the facts referred to as such at pages 9 and 10 of the petition, which include, of course, the local activities adverted to in the Memphis Natural Gas Co. case 335 U. S. 80 as that within Mississippi, Trunkline and the other pipe line companies interested herein maintained, kept in repair an dotherwise manned facilities of the system and which in the Memphis Natural the facilities of the system and of which at pages 82 and 83, the court refers to as:

> " * * * here the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system throughout the 135 miles of its line in this State."

17. Trunkline and the other pipe line companies have heretofore and upon this appeal will, we anticipate, take the position that the transportation of natural gas in interstate commerce could not be conducted, or would not be conducted, without the performance of local acts and things, which theye were doing in Missisippi, in maintaining, keeping in repair and otherwise manning the facilities of the line in Mississippi—the composite statement of the things and acts of which we say the lower court and this court take judicial knowledge and judicially know. The pipe line companies will extend such position to seek establishment of the fact that, therefore, the local activities are and constitute only interstate commerce iself, and, therefore, a tax based on the local activities would be a tax on interstate commerce. *This position is unsound and contrary to the following decisions of this court;*

(a) *Memphis Natural Gas Co. v. Stone,* 335 *U. S.* 80, 92 *L. Ed.* 1832, wherein the court dealing with exactly the same local activities as are involved here answers the above contentions in the negative and conclusively in favor of the position taken by the Attorney General of Mississippi in this cause wherein at page 96 of the court says reverting to the privileges and tax statutes set out immediately before the following quotation to the above pointed contention made in the Memphis Natural Gas case:

"The Mississippi excise has no more efect upon the commerce than any of the instances just recited. The events giving rise to this tax were no more essential to the interstate commerce than those just mentioned or ad valorem taxes. We think that the state is within its constitutional rights in exacting compensation under this statute for the protection it affords the activities

within its borders. Of course, the innterstate commerce could not be *conducted without these local activities. But that fact is not conclusive. These are events apart from the flow of commerce.* This is a tax on activities for which the state, not the United States, gives protection and the state is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business."

Incidentally, a privilege tax is merely an excise tax.

(b) The same contention was raised against the tax in the case of *Coverdale v. Arkansas-Louisiana Pipe Line Co.*, 303 *U. S.* 604, 82 *L. Ed.* 1043, anddenied by this tribunal and in which decision, without dissent, in 1937 the court speaking through Justice Reed says at page 612:

" * * * It bears generally on all use of power and is not discriminatory. It obviously adds to the cost of the interstate commerce. But increased cost alone is not sufficient to invalidate the tax as an interference with that commerce. Western Live Stock v. Bureau of Revenue, 303 U. S. at 254, ante, 826, 58 S. Ct. 546, 115 A.L.R. 944, supra."

The Coverdale case further rejecting the contention that because the pipe lines went through other states, such other states could levy a tax, and the court recognizing that such could happen rejected the claim as one of multipl taxation and responded with the following obvious answer, at page 613:

" * * * It is the length of the line, not interstate commerce, which makes another tax possible."

18. As indicated at page 29 of the record, the decision of the lower court determined and controlled similar cases pipe line companies (all of which were and are qualified

to do business in Mississippi), namely, Interstate Natural Gas Company, Interstate Oil Pipe Line Company, Mid-Valley Pipe Line Company, Plantation Pipe Line Company, Southern Natural Gas Company, Tennessee Gas Transmission Company, Texas Eastern Transmission Company, Texas Gas Transmission Company, Transcontinental Gas Pipe Line Corporation and United Gas Pipe Line Company, and their tax liability to the State of Mississippi; *the decision of this court in this cause will likewise be applied to the liabilities of the said companies, thus making this cause the test case.*

19. This cause is affected with a public interest. It involves the exercise of sovereign power of the State of Mississippi thereby furnish benefits and protection of such government and its laws to all persons and property and acts done by them within this state, including Trunkline and the other pipe line companies herein involved. The rights of the State or public, as such, in collecting taxes should not be lost or defeated if the preservation or enforcement thereof does not ultimately invade the legal rights of the taxpayer. The government must go on, and the only way it can "go" is by virtue of tax collections. The act or failure to act on the part of any public officer, official or group of officials, which may be rectified by the recognition of the true facts should have recognition, notice or knowledge taken thereof when so to do is within the power of the court and when so to do would avoid defeat of the collection of the taxes necessary to sustain government and will not *ultimately* invade the rights of the taxpayer. *The applciation of this principle to this cause is that judicial notice should be taken ,as herein contended for,* of the aforesaid "local activities" of Trunkline and further that any adjudication by the Tax Commission contrary to records and information

within the possession of the Tax Commission of which the Commissioner is Chairman, and any adjudication that by having paid income, ad valorem and franchise taxes Trunkline and the other pipe line companies had paid in full for the benefits an dprotection of the laws and government of Mississippi, and which latter adjudication appears contrary to the provisions of Chapter 410 of the laws of 1952 to the effect that the taxes thereby levied "are in addition to all other taxes" is, or should be, held to be ultra vires or not binding upon the State of Mississippi in this litigation.

We submit that any other rule would permit the dissipation of the rights of the state and the public. Furthermore, neither Trunkline nor the other pipe line companies could have, nor did they try to adduce any evidence on whether they had paid in full for the benefit of such laws and protection and patently, of course, this was and is a pure question of law, flown in the face of the unequivocal provisions of Chapter 410 (Pet. 9) that the tax levied "is in addition to all other taxes."

20. If upon the record in this cause as it exists, the record be inadequate in proof of material facts affecting the basic questions involved in this cause and to the extent that justice cannot be done to the questions involved and the rights of parties and those interested herein, then we submit that in accordance with the accepted appellate practice as announced by this court, and to which the Supreme Court is committed, as will be more fully developed in this brief, this Honorable Court should reverse and remand this cause for further proof below, in accordance with such directions as the court may see fit to prescribe.

V

ARGUMENT

SPECIFICATION 1

THE LOWER COURT ERRED IN NOT HOLDING THAT THE "OPERATING INCIDENCE" OF CH. 410 OF THE LAWS OF MISSISSIPPI FOR THE YEAR 1952 IS THE PRIVILEGE OF EXERCISING LOCAL RIGHTS AND POWERS, LOCAL ACTIVITIES, IN MISSISSIPPI, AND RECEIVING LOCALLY, IN MISSISSIPPI, THE BENEFIT AND PROTECTION OF THE GOVERNMENT AND LAWS OF MISSISSIPPI IN, TO AND OF SUCH LOCAL ACTIVITIES, AND SHOULD HAVE FOUND THAT THE STATUTE DID NOT VIOLATE THE COMMERCE CLAUSE FOR THE REASONS HEREIN SET OUT.

The ultimate and controlling point or question in this case is: What is the "operating incidence" of the tax levied and does it violate the Commerce Clause of the Federal Constitution? The determination of this question is, of course, affected by the determination of questions subordinate thereto, and all of which will be discussed in this brief.

As reflected by the record, the lower court rendered its first decision ultimately determining the statute to be valid, not violative of any constitution provision and speaking through Justice Ethridge held that the "operating incidence" of the tax was the privilege of exercising local rights and powers, local activities, in Mississippi, and receiving locally, in Mississippi, the benefit and protection of the government and laws of Mississippi in, to and of such local activities (R. 25-45, inclusive) and in which he was joined by Justices Alexander, Kyle, Lee and Arrington, constituting a majority. The first dissent

of the remaining four Justices appear in the record at pages 46-51, inclusive.

The second and final decision of the court rendered on Suggestion of Error appears in the record at pages 71 to 78, inclusive, wherein the court spoke through Justice Hall with Justices Lotterhos, McGehee, Roberds and Holmes concurring. Justice Ethridge with the three other survivors of the original majority dissented (R. 78-101, inclusive). With Justice Ethridge speaking for them, this dissent is substantially the same as the first opinion of the majority of the court with some amplification addressed to the final, majority opinion of the court (R. 78-101).

The prime base or bottom of the final decision of the lower court of March 2, 1953, was the holding that Trunkline and the other similiarly situated pipe line companies having paid ad valorem, income and franchise taxes had bought and paid *in full* for all benefits and protection of the laws and the government of the State of Mississippi and that Mississippi had exhausted its right or ability to levy any other tax based on such benefits and protection of the Mississippi laws. *Such a holding is contrary to the decisions of this court in the cases of Memphis Natural Gas Co. v. Stone,* 1948, 335 *U. S.* 80, 68 *S. Ct.* 1475, 92 *L. Ed.* 1832 *and Interstate Oil Pipeline Co. v. Stone,* 1949, 337 *U. S.* 662, 69 *S. Ct.* 1264, 93 *L. Ed.* 1613; *and the decision of the Supreme Court of the State of Mississippi in the case of Stone v. Memphis Natural Gas Co.* 201 *Miss.* 670, 29 *So.* (2*d*) 268 *and which latter decision is, for the convenience of the court, quoted in the appendix* (P. iii-vi incl.)

Proceeding from the foregoing basis which it used as the sole method to eliminate local activities in Mississippi as the basis for the tax, the court then proceeded

on the theory that with the said local activities eliminated the only thing the tax could operate on, or the only remaining basis for the tax levied by Chapter 410 would be *the privilege of engaging in interstate commerce in Mississippi.* Thus is is apparent, we believe, that if the above prime base is erroneous or ill-founded, then the conclusion of the court that the tax is levied solely upon the privilege of engaging in interstate commerce is erroneous and ill-founded. A careful reading of the opinion will show that there is no other way in which the court could have reached that conclusion.

Assuming, as we believe we must, that the limits of any review by this court is the limit of the final decision of the lower court and as the final decision of the lower court rejected all contentions of Trunkline and the other pipe line companies except the two contentions accepted by the court, stated above, we will limit the discussion in this brief to the holding of the lower court. In view of the foregoing this brief is limited to the determination of the ultimate question with the subordinate questions necessarily involved therein, of whether the "operating incidence" of the tax is the privilege of exercising local powers and local activities in Mississippi and receiving locally, in Mississippi, the benefit and protection of the government and laws of Mississippi in, to and of such local activities, which would include the question of whether such local activities existed and could serve as a base for the tax levied by said Chapter 410.

Justice W. N. Ethridge, Jr., speaking for the court in the first majority opinion, presented in the ultimate, the views of this petitioner and the State of Mississippi on the questions involved in this effort to seek review of the final decision of the lower court. *We will supplement the statements of Justice Ethridge only where we think*

such supplementation will be of assistance to the court in reaching its conclusion on these questions. We believe the terse announcements of Justice Ethridge constitute one of the soundest and most outstanding statements of the principles discussed we have ever had the opportunity to examine, and by its logic, analysis, depth and breadth of perception commends itself to the careful and considered examination of every one interested in the principles controlling this and other similar cases.

In view of the above mentioned limits upon the scope of this review we will, therefore, omit the remarks of Justice Ethridge which dealt with the other contentions of Trunkline (R. 29-32 incl.) and the other similarly situated pipe line companies, which the court apparently rejected by its final controlling opinion of March 2, 1953. We will omit here, also, that portion of the Ethridge opinion which dealt with the history of the case, the pleadings and the facts involved, all of which appear in the record. (R. 26-29 inclusive).

We will use our own paragraph numbering, as we believe the consecutive presentation of the remarks of Justice Ethridge will be more valuable to the court than if we undertake to group or break up and separate his remarks under different headings and divisions of this brief, as the court will recognize Justice Ethridge's remarks basically cover most of the sectional divisions and separate contentions in this brief:

"ETHRIDGE, JUSTICE.

1. "This is another in a long line of cases involving state taxation and the interstate commerce clause. The Circuit Court of the First Judicial District of Hinds County, Mississippi, held that a 1952 Mississippi privilege tax assessed against appellee, Trunkline Gas Company,

which is engaged in operating a natural gas pipe line through this state and in transporting natural gas through such pipe line, "for the privilege of exercising or enjoying such right and power in this state, and for the privilege of enjoying and receiving the benefit and protection of the government and laws of this state," was unconstitutional, being in violation of the interstate commerce clause of the United States Constitution, Art. 1, Sec. 8, Cl. 3."

2. "Appellee argues: ***(1) that [Ch. 410] H.B. 34 is a direct tax upon the privilege of doing interstate commerce and an interference with such commerce and, therefore, violates the interstate commerce clause of the Federal Constitution; and (2) that the taxpayer already pays Mississippi franchise, income, and ad valorem taxes, which are allegedly upon the same benefits and privileges taxed in House Bill 34, [Ch. 410], and that, therefore, the tax constitutes double taxation upon the same taxing incident and is violative of the due process and equal protection clauses of the Federal and State Constitution. We will deal with those points in that order." * * *

3. *"The question is whether the legislatively stated basis and operating incidence of the tax is permissible under the interpretations of the interstate commerce clause in the decisions of the United States Supreme Court.* (Emphasis ours) Initially, there is a basic proposition that every statute is presumed to be constitutional until it is shown beyond every reasonable doubt to be void; that the court will not presume that the legislature intended to do a vain or unconstitutional act; and that the invaladity of a statute must be shown clearly, convincingly, and beyong a reasonable doubt. Russell Investment Company v. Russell, 182 Miss. 385, 418, 178 So. 815, 182 So. 102 (1938)."

4. "We first look to the "operating incidence" of the tax. Memphis Steam Laundry Cleaner, Inc. v. Stone, 72 S. Ct. 424 (1952). House Bill 34 provides that it is a tax upon persons operating pipe lines in or through this state or engaged in transporting in or through this state crude oil, liquid petroleum products and natural or artificial gas through pipes or conduits. The person operating or engaged in transporting through this state such products in the pipe line is the one who is liable for the tax. The statute then states its basis, "for the privilege of exercising or enjoying such right and power in this state, and for the privilege of enjoying and receiving the benefit and protection of the government, and the laws of this state." *The tax is upon the privileges so received by the taxpayer, as defined in the quoted part of the statute, that is, for the privilege of exercising local rights and powers and receiving locally the benefit and protection of the government and laws of this state. It is an exaction and recompense to the state for the protection of the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system throughout its miles of line in this state. These are benefits and protections afforded by the State of Mississippi, and only by this state, and are subject to reasonable, non-discrimatory taxation which can not be subjected to repeated exactions in other states."* (Emphasis ours)

5. "The tax is not discriminatory. It is not subject to repeated exactions in other states, because it is based upon a certain amount on each mile of pipe line having graduated diameters within the state. Texas, Louisiana, Arkansas, Tennessee, Kentucky, and Illinois, through which appellee also has its pipe line, cannot tax the miles of pipe line in Mississippi or the benefits and protections afforded appellee in using, maintaining, and keeping in

repair such miles of pipe line, by the government and laws of this state. With these factors in existence, we think that the tax complies literally and adequately with the requirements of such taxation articulated in the decisions of the United States Supreme Court."

6. "As mentioned previously, [Ch. 410] House Bill 34 is a part of the state-wide privilege tax laws of Mississippi. Other instrumentalities in interstate commerce have for many years been subject to admittedly valid ad valorem, franchise, income and privilege taxation upon an apportioned and non-discriminatory basis. Illustrations are telephone and telegraph companies, railroad companies, sleeping car and express companies. These taxes are upon the local benefits and protections received in Mississippi by these instrumentalities in interstate commerce, and are properly apportioned. Barrett, State Taxation of Interstate Commerce, 4 Vanderbilt L. Rev. 496, 498-506 (1951). If appellee and other pipe line companies were not subject to similar privilege taxes, then interstate pipe line companies would be the only instrumentalities in interstate commerce receiving local benefits and protections which are not subject to such a tax. Railroad and other enumerated companies must pay a mileage, apportioned tax. *But appellee is in effect contending that it and other pipe line companies, simply because they transport gas and petroleum in pipe lines, are in a different and privileged category and not subject to apportioned, non-discriminatory privilege taxes. We can not concur in this position. The essence of due process and equal protection is equality of responsibility of each citizen and corporation receiving the benefits and protections of the laws of the state in paying for those privileges through a fair system of taxation. Immunizing appellee and other pipe lines from such privilege taxation*

would in fact result in inequality. Nor is there any factual reason why an interstate pipe line should not bear its share of privilege taxes, duly apportioned, along with other interstate carriers and utilities who receive the benefits and protections accorded to them by the state laws and government, and who exercise local activities such as those enumerated." (Emphasis ours)

7. "This tax is an integral part of a legitimate effort by the legislature to require all public utilities receiving these local privileges, benefits and protections to meet their fair share of the revenue system of the state and states in which they receive these benefits. *Limitations of the record upon certiorari do not preclude the court from taking cognizance of facts known to all. Appellee in order to construct its pipe line, had to condemn through eminent domain or purchase by contract land within the state upon or under which its pipe line runs. It had to use this land and the highways and transportation facilities of the state, constructed by the state at state expense, to move its pipe and equipment to the land upon or under which the pipe is located. If any repairs are necessary upon this pipe line, or any supervision of it is required, appellee must use these same state facilities for that purpose. Appellee expects and will receive the protection of the law enforcement officers and courts of this state in maintaining its pipe line against vandals and persons who might undertake to impede its operations or damage its facilities. The legislature was aware of these facts when it enacted this tax.*" (Emphasis ours)

8. "In Stone v. Interstate Natural Gas Company, 103 *F.* (2*d*) 544 (C.C.A. 5th 1939), the Fifth Circuit Court of Appeals upheld the validity of a Mississippi franchise tax levied upon capital used, invested, or employed in Mississippi, for the benefits and protections accorded

in Mississippi and apportioned to that used within the state. The taxpayer was an interstate gas pipe line company which in traversing Mississippi sold gas wholesale to three distributors in this state. It had qualified to do business in Mississippi. The Court observed that "immunity from taxation ought to be jealously regarded," and that the tax was a valid levy upon local activities, benefits and protections received by the company. It said: "And interstate carriers and merchants must pay general property taxes for State protection to their property in the State. Now when such property taxes prove insufficient to support the State government which protects their business as well as their property, why should not general taxes in other forms be shared by them, where not expressly prohibited by the Constitution? The State of Mississippi has not taxed this Gas Company on its transportation of gas into or through Mississippi. Whether it transports or not, or transports much or little, does not affect the tax. The tax therefore does not directly affect the transportation. Like a poll tax on men, it is demanded of all business corporations having capital in Mississippi just for being there with their capital. We hold the tax valid . . . " This decision was affirmed per curiam in 308 U. S. 522, 60 S. Ct. 292 (1940)"

9. "A recent case supporting these views is Stone v. Memphis Natural Gas Company, 201 Miss. 670, 29 So. 2d 268 (1947). The Memphis Natural Gas Company owned and operated a natural gas pipe line running from Louisiana and for 135 miles through Mississippi and into Memphis, Tennessee. The system included two compressing stations in this state. It was stipulated that the company, so far as Mississippi was concerned, operated solely and exclusively interstate. It had one customer in Mississippi to which it delivered gas wholesale, under a contract made

in another state. The company had not qualified to do business in Mississippi and had no employees other than those necessary to maintain the pipe line and its related facilities. The State Tax Commissioner assessed the company for the Mississippi franchise or excise tax under Code of 1942, Sec. 9314, which provides: " . . . a franchise or excise tax equal to $1.50 of each $1,000.00 or fraction thereof of the value of capital used, invested or employed within this state, except as hereinafter provided. It being the purpose of this section to require the payment of a tax by all organizations not organized under the laws of this state, measured by the amount of capital or its equivalent, for which such organization receives the benefits and protection of the government and laws of the state."

10. "Sec. 9312 defined the term "doing business" as including "each and every act, power or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organization, whether the form of existence be corporate, associate, joint stock company or common law trust." This court held: "It is to be seen that there is no attempt to tax interstate commerce as such, but the levy is an exaction which the State requires as a recompense for its protection of lawful activities carried on in this State by the corporation, foreign or domestic, activities which are incidental to the powers and privileges possessed by it by the nature of its organization—here the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system throughout the 135 miles of its line in this State." It was said that the incidental local activities carried on by the company in this state were substantial in nature and extent, and that the franchise tax had no substantial effect of im-

peding the free flow of commerce and was reasonable in its amount."

11. "This decision was affirmed in Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 68 S. Ct. 1475, 92 L. Ed. 1832 (1948). The controlling opinion stated: "Mississippi, through its Supreme Court, *has declared that there is no attempt to tax the privilege of doing an interstate business or to secure anything from the corporation by this statute except compensation for the protection of the enumerated local activities of "maintaining, keeping in repair and otherwise in manning the facilities.'* (Emphasis ours) 201 Miss. 670, 29 So. 2d 268. Under Sec. 9314, quoted in Note 1, in the light of that statute's definition of 'doing business' set out on page 2 supra, this is a reasonable meaning to give the taxing statute. We must accept the state court's interpretation. We therefore conclude that the Mississippi statute here involved is not upon the privilege of doing an interstate business . . . The Mississippi excise has no more effect upon the commerce than any of the instances just recited. The events giving rise to this tax were no more essential to the interstate commerce than those just mentioned or ad valorem taxes. We think that the state is within its constitutional rights in exacting compensation under this statute for he protection it affords the activities within its borders. Of course, the interstate commerce could not be conducted without these local activities. But that fact is not conclusive. These are events apart from the flow of commerce. This is a tax on activities for which the State, not the United States, gives protection and the state is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business."

12. "In a concurring opinion, Judge Rutledge pointed out that the tax was non-discriminatory, as is the present

privilege tax, and observed that the court had at the same term sustained a New York apportioned privilege tax upon gross receipts from interstate transportation of a bus company operating in interstate commerce. Central Greyhound Lines, Inc. of New York v. Mealey, 334 U.S. 653, 68 S. Ct. 1260 (1948). *He noted that the local activities for the protection of which the Mississippi tax purported to be laid "are incidents of carrying on that business taking place in Mississippi and only there, for which Mississippi affords protection received from no other state or the United States. Nor can any other state give that protection. For that portion of the business and the protection given it, I think the state is entitled to levy such a tax as had been placed here Nothing in the commerce clause or its great purposes forbids such an exaction. Nor is the state limited to a single exaction for different or indeed like protections afforded, so long as each is safeguarded against prohibited effects upon commerce, as are thos laid by Mississippi, and their aggregate cannot be shown to contravene the clause's purpose."* (Emphasis ours)

13. "The nature of the tax sustained in *Memphis Natural* and the present privilege tax are simliar as being indirect, excise or privilege taxes upon local benefits and protections conferred by Mississippi. Both taxes are apportioned, non-discriminatory, and not subject to duplication in other states. The franchise tax sustained in the *Memphis Natural* case was upon the exercise of the stated local benefits measured by the apportioned capital used, invested, or employed in this state. The privilege tax of [Ch. 410], House Bill 34 is upon the privilege of the corporation receiving and using local activities, benefits and protections granted by Mississippi and measured by the apportioned mileage and size of pipe line within

the state. Memphis Natural Gas Company v. Stone supoports the validity of the tax assessed in the instant case."

14. "In Interstate Oil Pipeline Company v. Stone, 337 U.S. 662, 69 S. Ct. 1264 (1949), the court affirmed a judgment of this Court in Interstate Oil Pipeline Co. v. Stone, 203 Miss. 715, 35 So. 2d 73, 36 So. 2d 142 (1948). The taxpayer was assessed with a privilege tax measured by the gross receipts "upon every person engaging or continuing within this state in the business of operating a pipeline for transporting for compensation or hire from one point to another in this state, oil or natural gas or artificial gas through pipes or conduits in this state . . . " Miss. Code 1942, Sec. 10109, 1950 Supp., p. 443. Interstate Oil Pipeline Company was a foreign corporation which had qualified to do business in Mississippi. It owned and operated pipe lines which were used to transport oil from leased tanks in various oil fields in this state to loading racks adjacent to railroads elsewhere in the state. From these racks, the oil was pumped into railroad tank cars for shipment outside the state. This Court held that the operation of these pipe lines between points within the state was intrastate rather than interstate commerce, and that the tax was a tax on the privilege of doing an intrastate business. The United States Supreme Court affirmed the assessment and said:

"We do not pause to consider whether the business of operating the intrastate pipe lines is interstate commerce for, even if we assume that it is, Mississippi has power to impose the tax involved in this case. Further, we do not find it necessary to dispute that the Supreme Court of Mississippi construed the statute as imposing a tax on the privilege of operating a pipe line wholly within the state, and not a tax solely upon the 'local activities of maintaining, keeping in repair, and otherwise in manning the

facilities,' situated in Mississippi, Memphis Gas Co. v. Stone, 335 U.S. 80, 92-93, 68 S. Ct. 1475, 1481, 92 L. Ed. 1832, or upon the gross receipts themselves, Central Greyhound Lines v. Mealey, 334 U.S. 653, 68 S. Ct. 1260, 92 L. Ed. 1633. While we are of course bound by the construction given a state statute by the highest court of the State, we are concerned with the practical operation of challenged state tax statutes, not with their descriptive labels . . . Since all the activities upon which the tax is imposed are carried on in Mississippi, there is no due process objection to the tax. The tax does not discriminate against interstate commerce in favor of competing intrastate commerce of like character. The nature of the subject of taxation makes apportionment unnecessary; there is no attempt to tax interstate activity carried on outside Mississippi's borders. No other state can repeat the tax. For these reasons the commerce clause does not invalidate this tax."

15. "The privilege tax construed in the *Interstate* case did not contain terms such as are in the state franchise tax, and in House Bill 34, [Chapter 410, Laws 1952] spelling out the operating incidence of the tax. The court was primarily concerned with whether the tax was non-discriminatory, reasonabl in amount, and not subject to repeated exactions outside Mississippi. These criteria were complied with and the tax as assessed was upheld."

16. "Appellee urges that Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602, 71 S. Ct. 508 (1951), controls, but we do not so construe that decision. Connecticut levied a tax or excise upon an interstate trucking company "for the privilege of carrying on or doing business within the state . . . "Taxpayer was a Missouri corporation engaged exclusively in interstate trucking. However, it had qualified to do business in Connecticut, leased and utilized

terminal facilities there, owned pickup and heavy trucks, and had twenty seven full-time workers in that state. The Connecticut Court construed the tax to be an excise upon the franchise of corporations for the privilege of carrying on and doing business in the state. It did not discriminate between interstate and intrastate commerce. The Court held that the "operating incident" of the tax as interpreted by the state court was upon the privilege of doing an interstate business, and that this method adopted by Connecticut of levying the tax, even though fairly apportioned to business done within the state, was invalid. The Court then made several significant statements in the controlling opinion to indicate that the tax could properly have been levied upon the local activities, benefits and protections received in Connecticut by this interstate trucking company. To support these statements, it cited among other cases the *Memphis Natural* and *Interstate* cases. The controlling opinion said:

"The objection to its validity does not rest on a claim that it places an unduly heavy burden on interstate commerce in return for protection given by the State. The tax is not levied as compensation for the use of highways or collected in lieu of an ad valorem property tax. Those bases of taxation have been disclaimed by the highest court of the taxing State. It is not a fee for an inspection or a tax on sales or use. It is a 'tax or excise' placed unequivocally upon the corporation's franchise for the privilege of carrying on exclusively interstate transportation in the State. It serves no purpose for the State Tax Commissioner to suggest that, if there were some intrastate commerce involved or if an appropriate tax were imposed as compensation for petitioner's use of the highways, the same sum of money as is at issue here might be

collected lawfully from petitioner. Even though the financial burden on interstate commerce might be the same, the question whether a state may validly make interstate commerce pay its way depends first of all upon the constitutional channel through which it attempts to do so . . . The answer in the instant case has been made clear by the courts of Connecticut. It is not a matter of labels. The incidence of the tax provides the answer. The courts of Connecticut have held that the tax before us attaches solely to the franchise of petitioner to do interstate business. The State is not precluded from imposing taxes upon other activities or aspects of this business which, unlike the privilege of doing interstate business, are subject to the sovereign power of the State. Those taxes may be imposed although their payment may come out of the funds derived from Petitioner's interstate business, provided the taxes are so imposed that their burden will be reasonably related to the powers of the State and non-discriminatory."

17. "House Bill 34, [Ch. 410], which is here in question, appears to be an adequate compliance by the legislature with these standards which were previously articulated in the *Memphis Natural* and *Interstate* cases."

18. "Nor do we think that Memphis Steam Laundry Cleaner, Inc. v. Stone, 72 S. Ct. 424 (1952) reversing ibid., 53 So. 2d 89 (Miss. 1951), affects this case. A Mississippi privilege tax was imposed upon persons "soliciting business for a laundry not licensed in this state." Appellant owned a laundry in Memphis, Tennessee, and solicited business, picked up and delivered laundry and cleaning in ten north Mississippi counties. It was held that the tax was invalid because it was laid upon the privilege of soliciting interstate business, citing the long line of "drummer" cases. It was further said that if the operat-

ing incidence of the tax was upon the pick-up and delivery of laundry and cleaning on regular routes within Mississippi, the tax was invalid because it discriminated against interstate commerce, since Mississippi laundries competing with appellant had to pay a tax considerably smaller in amount. By implication, if the tax had been construed solely as a tax upon the privilege of appellant exercising the local activities of picking up and delivering laundry, and had not been discriminatory, it would have been valid. The tax assessed under House Bill 34 is nondiscriminatory, and is upon the privilege of appellee exercising and using local benefits and protections granted by Mississippi in constructing, operating, repairing and maintaining its pipe line through the State. It in fact complies with the criteria of the Memphis Steam Laundry case."

19. "Appellee relies upon State Tax Commission of Mississippi v. Interstate Natural Gas Co., 284 U.S. 41, 52 S. Ct. 62, 76 L. Ed. 156 (1931). The tax there involved was a Mississippi privilege tax under Miss. Laws 1930, Chapter 88, Sec. 163, p. 188, "upon each person engaging and/or continuing in this state in the business of operating a pipe line or transporting in or through this state, oil, or natural, or artificial gas, through pipes, and/or conduits, a tax as follows . . . " The tax was measured by each mile of pipe line within the state and included only trunk lines. The taxpayer, a foreign corporation, operated an interstate trunk line from gas fields in Louisiana for 72.42 miles through Mississippi and back to Louisiana. Distributing companies tapped its pipe near Natchez and Woodville, and the gas withdrawn was measured by a meter at those points. The gas pressure was reduced before it passed into the wholesale purchaser's hands. A decree of a three-judge Federal Court permanently en-

joining the enforcement of the assessment against Interstate Natural Gas Company was affirmed in a short opinion. It was there said: "The work done by the plaintiff is done upon the flowing gas to help the delivery and seems to us plainly to be incident to the interstate commerce between Louisiana and Mississippi."

20. "We do not think that this case is applicable here for several reasons. The 1930 act, somewhat like the Connecticut statute in the *Spector Motor Service* case, was drafted as a tax upon the privilege of doing an interstate pipeline business. It was not a tax, as is House Bill 34, [Ch. 410] upon local activities, benefits and protections conferred only by Mississippi. The operating incidence of the 1930 tax was entirely different from that of the 1952 tax. The former contained none of the terminology which is in the 1952 statute spelling out the basis of the levy. This distinction between the 1930 statute as construed in the *Interstate Natural* case and the Mississippi franchise tax, upheld in *Memphis Natural Gas Company v. Stone,* was made specifically by the court in the latter case, 335 U.S. 80, 90-93, 68 S. Ct. 1475, 1480-1481. It was there pointed out that the operating incidence of the franchise tax then upheld was "different from the Mississippi statute in the Interstate case in 284 U.S." The same distinction exists between the 1930 and 1952 taxes. *Moreover, the powers of states to tax local benefits received by interstate instrumentalities had not been developed and interpreted in* 1931 *(the time of the Interstate case) to the extent that it has been developed in recent years. Brown, State Taxation of Interstate Commerce—What Now?* 48 *Mich. L. Rev.* 899 (1950); *Barrett, State Taxation of Interstate Commerce,* 4 *Vanderbilt L. Rev.* 496 (1951)."

21."In Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254, 58 S. Ct. 546, 82 L. Ed. 823 (1938), the Court said: "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. 'Even interstate commerce must pay its way,' . . . and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business."

22. "Existing decisions place major emphasis upon the existence of proper local incidents for the tax. But a more realistic test which has been applied in several cases is whether the tax imposes an actual economic burden upon commerce which is so substantial as to be disproportionate to the pipe line's legitimate obligations to the state. The formal incidence of the tax should be of less importance than the extent of the burden it places upon interstate commerce. Interstate commerce has grown so extensive in the past two decades that all states are called upon to give services to it—services which should be paid for at a fair rate."

23. "The test of a state's tax's validity should be a practical one dealing with economic facts. The fundamental problem is whether the tax, as a matter not of legal theory but of economic fact, imposes a substantial burden amounting to at least a potential barrier on interstate commerce. This commerce must pay its way in state taxes as in other costs. And so long as the state tax has only this effect it should be valid. The instant tax is nondiscriminatory, apportioned to mileage within the state, reasonable in amount, and not subject to repeated exactions in other states, Hence considered from the essentially economic aspects of this constitutional issue, as

well as from an application of the formalistic "local incidents of commerce" rule, the tax here assessed complies with the constitutional and factual requirements of the interstate commerce clause."

24. "Appellee argues that it already pays Mississippi franchise, income, and ad valorem taxes; that these taxes (especially the franchise tax) are upon the same local benefits, privileges and protections taxed in House Bill 34; that therefore the tax constitutes double taxation upon the same taxing incident or basis, and is violative of the due process and equal protection clauses of the State and Federal Constitutions.

25. "The taxing power of the State of Mississippi is vested by the State Constitution in the Mississippi Legislature. The responsibility for determining the revenue and appropriations for the state is vested in that body. The issue raised here by appellee involves primarily a question of legislative judgment and not of constitutional restriction. The amount of taxes upon all citizens, individual and corporate, is at times burdensome, but as Judge O. W. Holmes once said, that is the price which we pay for civilization. This appeal is by writ of certiorari and the record is confined to the document and papers before the Tax Commission. Appellee makes no showing, even if such were permissible, that the tax assessed against taxpayer is in excess of that paid by similar enterprises operating within the State, and appellee makes no showing whatever that the tax is so unusual, heavy and burdensome as to hinder or impede interstate commerce. There is no evidence in the record whatever to that effect."

26. "In Memphis Natural Gas Company v. Stone, supra, 335 U.S., at page 85, the Court said: "Nor can this result be changed by the suggestion that the tax cannot

be on any local incidents 'because they have already been fully taxed.' The local incidents, spoken of by the Supreme Court of Mississippi, were not the taxable events selected for the imposition of the ad valorem tax. These local incidents were the basis for the franchise or excise tax now in controversy. *No reason is perceived why Mississippi cannot exact this different tax for the same protection.* (Emphasis ours) It is as though the ad valorem rate had been increased. The power to levy such a new tax is not and could not be questioned except as an interference with commerce."

27. "In Interstate Oil Pipeline Co. v. Stone, supra, 337 U.S. at page 665, note 3, where the court was dealing with a privilege tax upon a person operating a pipe line, it was said "Other provisions of the Mississippi Code not here involved impose franchise, net income and ad valorem property taxes, all of which appellant paid for the years involved. *This fact does not of course preclude Mississippi from exacting a different tax for the protection upon which one or more of these taxes is based.* (Emphasis ours) E. g., Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 85, 68 S. Ct. 1475, 1477, 92 L. Ed. 1832."

"For the foregoing reasons the judgment of the circuit court is reversed and the final order of the State Tax Commissioner is reinstated and affirmed."

"Reversed and order of State Tax Commissioner reinstated and affirmed."

"Alexander, Lee, Kyle, and Arrington, JJ., concur."

SPECIFICATION 2.

THE LOWER COURT ERRED IN NOT TAKING JUDICIAL NOTICE OF THE LOCAL ACTIVITIES OF TRUNKLINE IN MISSISSIPPI AND GIVING PROPER EFFECT THERETO. THIS COURT MAY AND SHOULD DO SO.

Adopting the remarks of Justice Ethridge, supra, upon this feature of the case, and supplementing same as follows, we submit to the court:

Justice Ethridge in paragraph 7 of his opinion, supra, which constituted the first majority opinion of the lower court rendered on November 24, 1952, pointedly mentions the matters and facts of which the lower court did take judicial notice and which the Supreme Court of Mississippi judicially knows, and such, with those additional facts referred to in connection with the ownership and operation of compressor stations in Mississippi at page 10 of the Petition for Certiorari, constitute the facts referred in the Petition for Certiorari at pages 9 and 10 of which the lower court could or should or did judicially notice and same constitute the facts of which this court may take judicial knowledge and thereby judicially knows.

Justice Ethridge properly announced the rule in Mississippi that our Supreme Court judicially *knows or takes cognizance of facts known to all.*

The above facts referred to as those judicially known by the lower court and by this court constituting local activities in Mississippi engaged in and carried on here by Trunkline and the other pipe line companies are, in the final analysis, the same local activities as this court in the *case of Memphis Natural Gas Co., v. Stone,* 335

U. S. 80, 92 *L. Ed.* 1832, found were being engaged in by Memphis Natural in Mississippi and therein held to adequately sustain the franchise tax therein approved and which were " • • • maintaining, keeping in repair and otherwise manning the facilities of the system throughout the 135 miles of its line in this state."

We assert the abevo to be the true rule in Mississippi, and for the sake of brevity, unless this position is challenged by Trunkline, we will cite no further authority thereon.

As to the rule in this court, we understand it to be that this court will take judicial notice of and judicially know the foregoing facts. This statement of the rule is announced in the following cases, and in the absence of challenge thereasto, we rely upon the following authorities:

Hanley v. Donoghue, 116 *U. S.* 55, 29 *L. Ed.* 535 and *Adam v. Saenger, et al,* 303 *U. S.* 59, 82 *L. Ed.* 649.

SPECIFICATION 3

CHAPTER 410 OF THE LAWS OF MISSISSIPPI FOR 1952 PLAINLY, CLEARLY AND UNAMBIGUOUSLY STATES THE "OPERATING INCIDENCE" THEREOF AS BEING A TAX UPON THE PRIVILEGE OF EXERCISING LOCAL RIGHTS AND POWERS, LOCAL ACTIVITIES, IN MISSISSIPPI AND RECEIVING LOCALLY, IN MISSISSIPPI, THE BENEFIT AND PROTECTION OF THE GOVERNMENT AND LAWS OF MISSISSIPPI IN AND TO SUCH LOCAL ACTIVITIES, AND BEING UNAMBIGUOUS SHOULD BE ACCEPTED BY THE COURT AS WRITTEN WITHOUT CONSTRUC-

TION THEREOF, AND THE HOLDING OF THE COURT TO THE CONTRARY IS ERRONEOUS AND ILL-FOUNDED.

Adopting the remarks of Justice Ethridge upon this feature of the case and supplementing same as follows, we submit:

Looking at Chapter 410 as measured by its own terms and by way of analogy to the franchise tax statutes dealt with in the Memphis Natural Gas case, 335 U. S. 80, we say that said Chapter 410 is perfectly plain, clear and unambiguous.

Who is taxed by the statute? There is no ambiguity on this feature as it plainly so states. By what is the tax measured?—There is no ambiguity here, as it is the mileage of pipe in Mississippi of varying diameters and there is no doubt of the amount of tax.

Is there any uncertainty about whether the legislature clearly provided that the tax levied by Chapter 410 would be paid, in addition to all other taxes for which the person or persons taxed thereby might be otherwise paying—No. There can be no question on this feature, (Pet. 8) the statute says:

"* * * there is levied a tax, in addition to all other taxes as follows:"

This feature and point is particularly, we think, significant in this case and is entirely destructive of the contentions of the pipe lines that by paying ad valorem, franchise and income taxes they had bought and paid for, in full, all of the benefits and protection which Mississippi could give by its laws and government, provided the legislature had the right to make a further charge to the pipe lines for the benefits and protection received by

them in and about the acts and activities performed in Mississippi, in addition to the income, ad valorem and franchise taxes. The Memphis Natural Gas case, 335 U. S. 80 and other decisions of this court approving same squarely hold that the legislature of Mississippi can make this additional charge for those benefits and protection.

The foregoing provision of Chapter 410 is certainly clearly made in full recognition of the payment of the other taxes by the pipe lines.

Is there any ambiguity as to the base or the "operating incidence" of the tax?—We can see none. The act clearly states (Pet. 8.) "is the privilege of enjoying and receiving the benefit and protection of the government and laws of this state," which said another way "is the privilege of exercising local rights and powers, local activities, in Mississippi, and receiving locally, in Mississippi, the benefit and protection of the government and laws of Mississippi in, to and of such local activities."

What pipe lines is the tax levied against? They are inter and intrastate trunk lines with those exempt therefrom clearly stated.

Do we have any other statute in Mississippi by which we can measure the clarity of the legislative statement in Chapter 410? We believe we do and that it is the franchise tax levied by Sections 9312 and 9314 of the Mississippi Code of 1942, which the lower court in 1947 in the case of *Stone, Chairman of the State Tax Commission v. Memphis Natural Gas Company*, 201 *Miss.* 670, 29 *So.* (2*d*) 268 found to be perfectly clear and *not a tax upon the privilege of doing interstate business*, but was a clear legislative declaration of a tax whose "operating incidence" was clearly stated by Justice Griffith at page 647 of the opinion wherein the court said:

....''It is to be seen that there is no attempt to tax interstate commerce as such, but the levy is an exaction which the State requires as a recompense for its protection of lawful activities carried on in this State by the corporation, foreign or domestic, activities which are incidental to the powers and privileges possessed by it by the nature of its organization—here the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system throughout the 135 miles of its line in this State.''

This Honorable Court in the case of *Memphis Natural Gas v. Stone,* 335 *U. S.* 80, 92 *L. Ed.* 1832, affirmed the above decision of the lower court and held the tax to have been clearly legislatively stated as a tax on local activities in Mississippi, and which local activities were as contained in the above quotation from the lower court.

An examination and comparison of Chapter 410 to Section 9312 of the Code of 1942 (Appendix P.....) demonstrates how literally Chapter 410 is lifted from Section 9312, second paragraph thereof.—Section 9312 says that ''doing business'' or the thing taxed is ''*every act, power or privilege* exercised or enjoyed in this State * * *.''

Chapter 410 says that the thing taxed is ''for the privilege of exercising or enjoying such right (the rights referred to in the preceding part of statute) and power in this state.'' Section 9312 uses the words ''privilege,'' ''exercised'' and ''enjoyed.'' Chapter 410 uses the same words ''privilege,'' ''exercising'' and ''enjoying.'' The only difference is Chapter 410 uses the present tense instead of the past when using the words ''exercise and enjoy.'' This court in the Memphis Natural case, 335 U. S. 80, held that the thing taxed by Section 9312 and measured by Section 9314 were ''local activities in maintaining, keeping in repair and otherwise manning the facil-

ities of the system throughout the 135 miles of its line in this State." The use of the term "doing business" in Section 9312 certainly cannot differentiate it from or add anything to it as against Chapter 410 when the thing or things defined in 9312 and Chapter 410 are one and the same things. Adding the words "doing business" to Chapter 410 would not add anything to it when measured by the Memphis Natural case, supra.

We submit the result is that the statutes are in effect the same and all are clear and unambiguous. Certainly Chapter 410 did not deserve or permit any construction contrary to these clear terms.

If Chapter 410 is, as we contend, clear and unambiguous and its meaning settled by the Memphis Natural Case, 335 U. S. 80, then the lower court could not correctly determine the "operating incidence" of Chapter 410 to be the privilege of engaging in interstate commerce by way of construing Chapter 410. The only other way the lower court could arrive at the "operating incidence" adopted by that court is on the theory of the holding that by payment of the franchise, income and ad valorem taxes Mississippi could not again charge for the benefits and protection received by Trunkline and the other pipe line companies in Missisippi for their local activities, including maintaining, keeping in repair and otherwise manning the facilities of the system in Mississippi. Under the rule on this feature as announced in the Memphis Natural Case, 335 U. S. 80, such a holding of the lower court cannot be sustained.

The lower court should have accepted its terms, as written, and should not have sought to construe or give it any meaning by way of construction contrary to those terms; that a determination of the lower court of the

"operating incidence" of the statute by way of construction of the statutes constitute an erroneous and ill-founded decision and should not be recognized or accepted.

There is no distinction, as we read the cases, between the rule of law in Mississippi and in this court that a plain, clear and unambiguous statute must be accepted by the court as written.

The Mississippi rule has been clearly announced, never departed from and is stated in the following cases:

"Interpretive devices, however, may be resorted to only to solve ambiguity."—*Jasper County v. Town of Heidelberg,* 1948, 204 *Miss.* 780, 38 *So.* (2*d*) 97.

Hamner v. Yazoo Delta Lumber Co., 100 *Miss.* 349, 56 *So.* 466, wherein the court speaking through Mr. Justice McLean at pages 417 and 418 says:

" . . . The courts have no right to add anything to or take anything from a statute, where the language is plain and unambiguous. To do so would be intrenching upon the power of the legislature. Neither have the courts authority to write into the statute something which the legislature did not itself write therein, nor can they ingraft upon it any exception not done by the lawmaking department of the government. Whenever the judiciary shall undertake to violate these rules—indeed, we may say maxims—then it is guilty of usurpation in its most obnoxious form; and the courts dare not do this lest they destroy their own usefulness and power.

"A statute which is plain and unambiguous, clear and free from doubt, is its own interpreter, and in such cases it is not necessary to resort to any rule of

construction in order to ascertain its meaning. It is not for the judiciary to determine the wisdom, but simply to enforce the statute as it is written, and leave the responsibility where it justly belongs—upon its creator, the legislature. All of these principles are but hornbook law, known and familiar to all who are mere infants in the school of law and in its primary and academic departments. When there is doubt or obscurity in a statute, one of the cardinal rules of construction is to ascertain the condition of affairs at the time of its enactment, the evil to be avoided, and the necessary effect produced by the statute."

City of Hazlehurst v. Mayes, 96 *Miss.* 656, 51 *So.* 890 wherein the court said at page 665:

" . . . It is plain and unambiguous as it is. It is not within the province of this court to add to the law as the legislature has written it."

Wilson v. Yazoo & M. V. R. R. Co., 192 *Miss.* 424, 6 *So.* (2*d*) 313, wherein the court said:

"No principle is more firmly established, or rests on more secure foundations, than the rule which declares when a law is plain and unambiguous, whether it be expressed in general or limited terms, that the legislature shall be deemed to have intended what they have plainly expressed, and, consequently, no room is left for construction in the application of such a law."

The decisions in this court announce the same rule and in the absence of challenge thereasto we will not burden the court with citing its own decisions.

With all deference to the court, we submit that there is only one conclusion and that is that the decision of the lower court is ill-founded.

SPECIFICATION 4

THE LOWER COURT ERRED IN HOLDING THE TAX INVOLVED NOT VALID AS VIOLATIVE OF THE COMMERCE CLAUSE EVEN THOUGH IT BE ACTUALLY A TAX UPON THE PRIVILEGE OF ENGAGING IN INTERSTATE COMMERCE.

We make this contention rather deferentially, in view of the decisions of this court with which we are familiar. We present the contention, however, because it appears to us that in view of the rapid growth of interstate commerce and the probability of the increase thereof in the nation that ultimately the complex situations surrounding state taxation of interstate commerce, to produce needed state revenues, will permit of only one solution of the question, *and that is, validity or non-validity of the tax dependent upon whether the tax involved, either by itself, or when added to the other state taxes, imposes* an actual economic burden upon commerce which is so substantial as to be disproportionate to the pipe line's legitimate obligations to the state, or constitute such an economic burden as actually impedes or restricts interstate commerce. On this feature we refer to the case of *Interstate Oil Pipeline Co. v. Stone,* 1948, 337 *U. S.* 662, 93 *L. Ed.* 1613, wherein the court, dealing with the Mississippi privilege tax measured by gross receipts from the operation of a pipe line wholly within the state, but whose owner contended that they were engaging only in interstate commerce and that, therefore, the tax, as such, was a tax upon the privilege of engaging in interstate commerce, but which contention was rejected by the court with four Justices determining to sustain the tax, even though only interstate commerce was involved, said at page 666:

"We do not pause to consider whether the business of operating the intrastate pipe lines is interstate commerce, *for, even if we assume that it is, Mississippi has power to impose the tax involved in this case.*"

In the Interstate Oil case, as in the case at bar, the tax involved was not discriminatory, was duly apportioned, could not be repeated by any other state, and was not unduly burdensome in fact.

If we be deemed repititious in requoting here a portion of the opinion of Justice Ethridge we beg indulgence and foregiveness of the court, but to do so in view of the context of such quotation, which is:

"Existing decisions place major emphasis upon the existence of proper local incidents for the tax. But a more realistic test which has been applied in several cases is whether the tax imposes an actual economic burden upon commerce which is so substantial as to be disproportionate to the pipe line's legitimate obligations to the state. The formal incidence of the tax should be of less importance than the extent of the burden it places upon interstate commerce. Interstate commerce has grown so extensive in the past two decades that all states are called upon to give services to it—services which should be paid for at a fair rate.

"The test of a state tax's validity should be a practical one dealing with economic facts. The fundamental prbolem is whether the tax, as a matter not of legal theory but of economic fact, imposes a substantial burden amounting to at least a potntial barrier on interstate commerce. This commerce must pay its way in state taxes as in other costs. And so long as the state tax has only this effect it should be valid. The instant tax is non-discriminatory, apportioned to mileage with-

in the state, reasonable in amount, and not subject to repeated exactions in other states. Hence considered from the essentially economic aspects of this constitutional issue, as well as from an application of the formalistic 'local incidents of commerce' rule, the tax here assessed complies with the constitutional and factual requirements of the interstate commerce clause."

PETITIONER'S AFFIRMATIVE SPECIFICATIONS

AFFIRMATIVE SPECIFICATION 1.

THE DETERMINATION OF THE LOWER COURT OF THE "OPERATING INCIDENCE" OF THE TAX LEVIED BY CHAPTER 410 IS NOT BINDING ON THE SUPREME COURT OF THE UNITED STATES BECAUSE SUCH DETERMINATION IS ILL-FOUNDED OR NOT A REASONABLE INTERPRETATION OF CHAPTER 410; THE SUPREME COURT OF THE UNITED STATES MAY DETERMINE FOR ITSELF THE "OPERATING INCIDENCE" OF THE TAX.

While Trunkline and the other similarly interested pipe line companies involved in this case are asserting their constitutional rights *still in* no event, however, should we lose sight of the fact that Mississippi and its public at large have some constitutional rights involved in this case and which constitutional rights, going to the heart of the cause, are that Mississippi may determine who shall be taxed, the base and incident thereof, and for what and how much they shall be taxed provided the constitutional rights of the taxpayer are not *ultimately* invaded. While *we write so much about the constitutional rights of the pipe line companies, we must also remain conscious of the constitutional rights of Mississippi.*

The rights of Mississippi should not be sacrificed or invaded by any rule which might be construed to

mean that the decision of the Supreme Court of Mississippi in determining the "operating incidence" of this tax would block or bar this court from protecting the constitutional rights of Mississippi when measured by the Federal Constitution, the laws of Mississippi consisting of its own constitution, its statutes and other decisions of its Supreme Court besides the one involved in this case.

As applied to the case at bar, if this court is *precluded* from determining the "operating incidence" of the tax involved or it is beyond further determination thereof and is limited to the decision of the lower court, then we say that the constitutional rights of Mississippi will be sorely prejudiced.

We are reluctant to believe that the announcements of this court in *Memphis Steam Laundry Cleaners, Inc. v. Stone,* 1952, 342 *U. S.* 389, 96 *L. Ed.* 436; *Spector Motor Service, Inc. v. O'Connor,* 1951, 340 *U. S.* 602, 95 *L. Ed.* 573, and *Memphis Natural Gas Co. v. Stone,* 1947, 335 *U. S.* 80, 92 *L. Ed.* 1832, held, or substantially hold that the State Court may, *with immunity to review,* determine for itself the "operating incidence" of the tax, or that the determination of that "operating incidence" by the lower state court is binding upon this court irrespective of how ill-founded, falacious or erroneous it might be.

In this case we must not lose sight of the announcements of Justice Frankfurter in the case of *Wisconsin v. J. C. Penney Co.,* 1941, 311 *U. S.* 435, 85 *L. Ed.* 267, when, at pages 443, 444 and 445, he says among other things:

> " A tax is an exaction. Ascertainment of the scope of the exaction—what is included in it—is for the state State court. But the descriptive pigeonhole into which a state court puts a tax is of no moment in determining

the constitutional significance of the exaction. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect . . .

" . . . A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society. . . .

" . . . *We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize.*" (Emphasis ours).

The rule which we believe fits the reviewability or conclusiveness of the determination by the lower court of the "operating incidence" of the tax involved is that rule so clearly stated by Justice Van Devanter in 1917 in *Cudahy Packing Co. v. Minnesota,* 246 *U. S.* 450, 62 *L. Ed.* 827, at page 454 thereof:

"As before stated, the state court regards the tax as imposed in respect of the property rather than the earnings, and the same view seems to be taken by the legislature, for the Act of 1909 speaks of the tax as 'a tax upon its [the company's] property,' and the Act of 1911 says 'the value of such property [that used within the state] for the purposes of taxation is to be determined' by reference to the gross earnings from the mileage within the state. True, this local view is not conclusive on this court, but it cannot be rejected unless it can be said to be ill-founded."

The rule contended for by us is clearly stated in the case of *Educational Films Corp. v. Ward,* (1931), 282 *U. S.* 379, 75 *L. Ed.* 400, when the court speaking through Justice Stone says at page 387 of the official report and at page 404 of L. Ed. says:

> "... As was said in Macallen Co. v. Massachusetts, 279 U. S. 620, 73 L. Ed. 874, 878, 879, 65 A.L.R. 866, 49 S. Ct. 432, 'neither state courts nor legislatures, by giving the tax a particular name, or by using some form of words, can take away our duty to consider its nature and effect."

By way of illustration of the point we contend for in this section of the brief, and meaning no disrespect to the court involved, suppose the lower court had determined or decided the "operating incidence" of the tax involved to be something utterly, grossly and patently foreign to the case, even by an extravagent view thereof, then certainly such finding would not be binding upon this court.

We believe the true rule announced on this narrow question by the decisions of this Supreme Court of the land goes no farther than that if this court upon examination of the question believes that the rule announced by the lower court is reasonably sustainable upon the state statutes involved and is not ill-founded, then this court will accept the determination of the lower court. To hold otherwise would withdraw from this court what we believe is the necessarily inherent power of the court to maintain uniformity and clarity in the decisions affecting interstate commerce and to preserve the Constitution of the United States. Any rule permitting a state court *free reign* in determining what often amounts to the sine qua non of a decision construing the Commerce Clause of the Federal Constitution would, we think, lead to and result in utter chaos.

See also *Senior v. Braden*, 1935, 295 *U. S.* 422, 79 *L. Ed.* 1520, wherein the court spoke through Justice McReynolds.

See also the case of *Adam v. Saenger*, 1937, 303 *U. S.* 59, 82 *L. Ed.* 649, which involved the question of whether the decision of the State court is binding upon this Supreme Court, wherein the court speaking through Justice Stone says at page 64 of the official report and at page 653 of the L. Ed:

> "While this Court re-examines such an issue with deference after its determination by a state court, it cannot, if the laws and Constitution of the United States are to be observed, accept as final the decision of the state tribunal as to matters alleged to give rise to the asserted federal rights." . . .

AFFIRMATIVE SPECIFICATION 2.

IF JUSTICE DEMANDS, OR IF IN ORDER TO DO JUSTICE TO THE QUESTIONS INVOLVED AND THE RIGHTS OF THE PARTIES, THIS COURT MAY AND SHOULD REVERSE AND REMAND THIS CAUSE, FOR FURTHER PROOF WITH SUCH DIRECTIONS AS THIS COURT MAY PRESCRIBE.

This portion of the brief is motivated by what we believe is the ultimate mutual desire of all parties hereto, and those whose rights will be measured hereby.

If, after consideration of this record and the questions involved, this court feels that the record is not adequate upon which to do justice to the questions involved and the rights of the parties, we submit that the court reverse and remand this cause for further proof below in accordance with such directions, if any, as the court might chose to prescribe.

This matter involving the revenue of the State of Mississippi whereby its government is maintained and operated, is of deep moment to us, and we believe, correlatively speaking, of equal concern to all other states and industry and commerce throughout the Nation.

As the questions involved in this cause are affected with a public interest, we sincerely feel that such rights, as the State of Mississippi and its public at large, have or should have upon an adequate record, if the court be in doubt as to the adequacy of this record, should not be prejudiced or withheld in the ultimate. On this principle and under the spotlight of that vicious weapon "hind sight" it may be that a more complete record would more thoroughly answer the demand of the broad questions involved. The public ultimately should not be denied the benefit or the disadvantages of what *all of the facts might produce or demand.*

We think the facts which we suggest are judicially noticed or judicially known are properly and adequately in this record, for consideration, as facts by the court, but if we be mistaken, then certainly the record is adequate for the rendering of justice to the questions involved and the rights of the parties and those interested therein, including commerce generally, the public of Mississippi and the other states in the union.

The principle that the court desires to "do justice" is everywhere recognized in appellate procedure.

The Mississippi Supreme Court is committed to this principle of appellate practice; in stating the latest announcement of the Mississippi rule on January 5, 1953, in the case of *Karr v. Armstrong Tire and Rubber Company,* not yet officially reported, but unofficially reported in 61 So. (2d) 789, the court speaking through Justice

Roberds in a workman's compensation case in which the court was not satisfied with the proof below as being sufficient on which it could render justice did, therefore, reverse and remand the cause to the lower Circuit Court, and at page 793 says:

> "Everything considered we believe justice requires that this matter be reconsidered. By this we do not mean to adjudicate, or intimate, what the result of another hearing should be.
>
> "Reversed and remanded."

The same rule, we find, prevails in this Honorable Supreme Court and Justice Hughes speaking for the court in 1938 in the case of *Ford Motor Co. v. National Labor Relations Board*, 305 *U. S.* 364, 83 *L. Ed.* 221, at page 373, says:

> "It is familiar appellate practice to remand causes for further proceeding without deciding the merits, where justice demands that course in order that some defect in the record may be supplied."

Citing therefor the cases of:

Estho v. Lear, 7 Pet. 130, 8 L. Ed. 632; Levy v. Avvedondo, 12 Pet. 218, 9 L. Ed. 1062; Villa v. Van Schaiick, 299 U. S. 152, 155, 156, 81 L. Ed. 91-93, 57 S. Ct. 128.

Again this court speaking in the case of *Willing v. Binenstock*, 302 *U. S.* 272, 82 *L. Ed.* 248, through Justice Sutherland says at page 277:

> "The facts are not sufficiently disclosed by the record to enable us to dispose of this item * * *. In these circumstances, the case must be remanded to the District Court for further consideration of the question, with authority, in its discretion, to take further evidence to that end."

In view of the foregoing we ask that the court reverse and remand this cause for further proof below under such directions as the court may specify if the court be of the opinion that justice to the questions involved and the rights of the parties cannot be done upon the present record.

CONCLUSION

WHEREFORE, the Petition for Certiorari should be granted.

Respectfully,

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